U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 30 2015 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (Director), denied the immigrant visa petition and affirmed his decision after granting the petitioner's motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides healthcare staffing services. It seeks to employ the beneficiary permanently in the United States as an operations research analyst. The petition requests preference classification of the beneficiary as a member of the professions holding an advanced degree under Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).

The Director concluded that the petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on February 8, 2014. The Director granted the petitioner's motion to reopen and affirmed his decision on May 15, 2014.

The appeal is properly filed and alleges specific errors in law and fact.[1] The record documents the case's procedural history, which is incorporated into this decision. We will elaborate on the procedural history only as necessary.

We exercise appellate review on a *de novo* basis. *See Vercillo v. Commodity Futures Trading Comm'n*, 147 F.3d 548, 553 (7th Cir. 1998) (citing the Administrative Procedures Act at 5 U.S.C. 557(b), which states that, on appeal or review, "an agency has all the powers which it would have in making the initial decision, except as it may limit the issues on notice or by rule"). We consider all pertinent evidence of record, including evidence properly submitted on appeal.[2]

Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2); *see also Constr. & Design Co. v. USCIS*, 563 F.3d 593, 594 (7th Cir. 2009). Evidence of the ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

[1] In our Notice of Intent to Dismiss (NOID), dated September 18, 2014, we questioned whether the petitioner authorized the appeal. The Form G-28, Notice of Appearance, submitted on appeal identified the petitioner's signatory as its president. However, online Indiana corporate records indicate that another individual serves in that capacity. *See* Ind. Sec'y of State, Bus. Servs. Div., https://secure.in.gov/sos/online_corps/view_details_ppv.aspx (accessed Nov. 5, 2014). In response to the NOID, counsel asserted that the signatory is the petitioner's president and submits a new Form G-28 and a complete copy of the petitioner's 2012 federal income tax return, which identifies the signatory as a shareholder of the petitioner. The record does not establish the signatory as the petitioner's president. However, because the record identifies him as a shareholder, we will accept his signature on the new Form G-28 as an authorized company representative. *See* 8 C.F.R. § 292.4(a) (requiring a Form G-28 to be properly completed and signed by a petitioner).

[2] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of evidence on appeal. The instant record provides no reason to preclude evidence newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

In the instant case, the petition's priority date is January 23, 2013, which is the date the U.S. Department of Labor (DOL) accepted the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), for processing. *See* 8 C.F.R. § 204.5(d). The labor certification, which the DOL approved, states the proffered wage for the offered position of operations research analyst as $72,000 per year.

A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). U.S. Citizenship and Immigration Services (USCIS) requires a petitioner to demonstrate sufficient financial resources to pay a beneficiary's proffered wages. However, USCIS will also consider the totality of the circumstances affecting a petitioner's business. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining a petitioner's ability to pay a proffered wage, USCIS first examines whether the petitioner employed the beneficiary during the relevant period. If the petitioner establishes that it employed the beneficiary at a salary equal to or greater than the proffered wage, USCIS will consider the evidence as *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the record does not establish that the petitioner employed the beneficiary. The beneficiary did not state on the accompanying labor certification that he worked for the petitioner. The record also does not include any documentation indicating that the petitioner has paid the beneficiary.

If a petitioner does not establish that it employed a beneficiary, USCIS next examines the net income amounts reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Federal courts have upheld USCIS's reliance on federal income tax returns as a basis for determining a petitioner's ability to pay a proffered wage. *See Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984)); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985).

The record contains copies of the petitioner's federal income tax returns for 2011 and 2012. However, the record does not contain any of the materials required by 8 C.F.R. § 204.5(g)(2) for 2013, the year of the petition's priority date, or thereafter.

In our NOID, we requested a copy of the petitioner's annual report, federal income tax return, or audited financial statements for 2013 pursuant to 8 C.F.R. § 204.5(g)(2). In response, counsel asserted that the company requested an extension of time in which to submit its federal tax return for 2013. Counsel stated that evidence of the petitioner's extension request was included in the

materials submitted in its NOID response. However, the materials we received in response to our NOID do not include such evidence.[3]

Counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)) (holding that uncorroborated statements are insufficient to meet the burden of proof in visa petition proceedings). Therefore, the record does not contain the required evidence of the petitioner's ability to pay the proffered wage from the petition's priority date onward or of the unavailability of the required evidence. *See* 8 C.F.R. § 103.2(b)(2)(i) (requiring a petitioner to demonstrate the unavailability of required documentation and to submit secondary evidence of the facts at issue). We also note that the Director requested additional evidence of the petition's ability to pay in his Request for Evidence (RFE), dated October 18, 2013. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a benefit request. 8 C.F.R. § 103.2(b)(14).

Therefore, the record lacks any regulatory required evidence of the petitioner's ability to pay the proffered wage. While counsel claims that the petitioner's tax returns are unavailable, the petitioner has not documented the claimed unavailability. Further, the petitioner failed to provide any other evidence permitted by regulation to demonstrate its ability to pay, such as audited financial statements. The petitioner has not asserted the unavailability of these documents.

Also, our NOID requested additional information and evidence regarding other Forms I-140, Petitions for Alien Workers, filed by the petitioner. USCIS records indicate that the petitioner has filed at least 37 petitions for other beneficiaries since the instant petition's priority date. Additional petitions filed before that date may also have remained pending after the instant petition's priority date.

A petitioner must demonstrate its continuing ability to pay the proffered wage for each petition filed. 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. at 144-45. Therefore, the petitioner must demonstrate its ability to pay the combined proffered wages of the beneficiary of the instant petition and the beneficiaries of other petitions pending from the instant petition's priority date onward. The petitioner must demonstrate its ability to pay the combined proffered wages of the other beneficiaries until they obtained lawful permanent resident status, or until their petitions were denied, withdrawn, or revoked.

[3] On October 21, 2014, the petitioner provided a letter from counsel, Indiana corporate records, a court document, copies of its 2011 and 2012 federal income tax returns, an unpublished AAO decision, letters from one of the beneficiary's former employers, and an H-1B approval notice. On October 27, 2014, counsel provided an evaluation of the beneficiary's foreign education credentials. On November 19, 2014, counsel further provided a letter from another of the beneficiary's former employers. The petitioner's NOID responses of October 27, 2014 and November 19, 2014 are untimely. *See* 8 C.F.R. § 103.2(b)(13)(i) (stating that USCIS "may" summarily deny as abandoned a petition where the petitioner fails to respond to a notice of intent to deny by the required date). However, exercising our discretion, we will consider the untimely NOID responses.

The Director requested the petitioner to demonstrate its ability to pay the combined proffered wages of the beneficiaries in his RFE. The record shows that the Director denied the petition after the petitioner did not provide the requested information and evidence regarding the other beneficiaries in response to the RFE.

With its motion to reopen, the petitioner included a list of I-140 petitions that it filed. However, the list does not identify all of the other pending petitions reflected in USCIS records. The petitioner also did not provide, as requested by the Director's earlier RFE, the priority dates or proffered wages of the other petitions or documentary evidence of any wages paid to the other beneficiaries.

The petitioner's failure to provide requested evidence of its ability to pay precludes a material line of inquiry, warranting the petition's denial pursuant to 8 C.F.R. § 103.2(b)(14). Because the petitioner failed to provide the requested evidence, we are unable to determine its ability to pay the proffered wage. As discussed above, the petitioner did not submit required evidence of its ability to pay from the petition's priority date onward pursuant to 8 C.F.R. § 204.5(g)(2) or of the unavailability of the required evidence pursuant to 8 C.F.R. § 103.2(b)(2)(i). Therefore, the record does not establish the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel argues that USCIS erred in focusing on the petitioner's ability to pay its other beneficiaries. Counsel asserts that copies of the petitioner's income tax returns and quarterly payroll taxes of record demonstrate its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). Counsel states that the petitioner bills its customers more for a healthcare professional's services than it pays the professional in wages. Counsel argues that "the more healthcare professionals the petitioner places, the greater will be its net income." Therefore, counsel asserts that the petitioner's net income is not needed to pay the wages of its healthcare professionals, but rather "is available to pay office employees like the beneficiary."

Counsel argues that all of the petitioner's net income is available to pay non-clinical employees like the beneficiary, as its net income reflects funds available after the payment of the wages of its clinical employees. Counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898, 903 (D.C. Cir. 1989), which states that "one would expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceeds their wages".

However, pursuant to counsel's argument, the petitioner must place enough clinical employees to generate sufficient income to pay the wages of the beneficiary and its other non-clinical workers. The record does not contain sufficient evidence to support counsel's argument. Besides the beneficiary, the record does not indicate how many non-clinical workers the petitioner employs, their total wages, or which employees it sponsored for immigrant visas. The record also does not indicate how many clinical employees the petitioner has placed or the net income it has generated since the petition's priority date.[4] The record does not contain any figures or documentation from

[4] The record contains copies of the petitioner's federal quarterly payroll tax return for the first quarter of 2013, which contains information from January 2013 through March 2013, a period including about two months after the petition's priority date of January 23, 2013. The payroll tax return indicates that the petitioner employed 69 people and paid them

the petitioner, its financial officers, or an objective certified public accountant to corroborate counsel's argument. Therefore, counsel's unsupported argument does not establish the petitioner's ability to pay the proffered wage. *See Matter of Obaigbena*, *supra*, at 534 n.2 (noting that counsel's assertions do not constitute evidence); *see also Matter of Soffici*, *supra*, at 165 (citing *Matter of Treasure Craft of Cal.*, *supra*, at 193) (holding that uncorroborated statements are insufficient to meet the burden of proof in visa petition proceedings).

In addition, as previously discussed, the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to submit copies of annual reports, federal income taxes, or audited financial statements to establish its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The record contains copies of the petitioner's 2011 and 2012 federal income tax returns, but the record does not contain required evidence from the petition's January 23, 2013 priority date or thereafter. The petitioner has not established the unavailability of the required evidence. *See* 8 C.F.R. § 103.2(b)(2)(i). Counsel's unsupported assertion cannot stand in lieu of the regulatory required evidence. Thus, the record does not establish the petitioner's ability to pay pursuant to the regulations.

Counsel also argues that USCIS should consider the petitioner's growth and number of employees in determining its ability to pay the proffered wage. As previously indicated, USCIS may consider such factors regarding the overall magnitude of a petitioner's business activities in determining its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

In *Matter of Sonegawa*, the petitioner had conducted business for more than 11 years, employing up to eight people and routinely earning an annual income of about $100,000. However, its federal income tax return for the year of the petition's filing reflected insufficient net income to pay the beneficiary's proffered wage. During that year, the petitioner moved its business, causing it to pay rent at two locations for a five-month period and to incur substantial relocation costs. The move also forced it to briefly stop doing business. Despite these difficulties, the Regional Commissioner found that the petitioner would likely resume successful business operations and had established its ability to pay the proffered wage. National magazines had featured the petitioner's work as a fashion designer. Her clients included beauty pageant winners, movie actresses, society matrons, and individuals included on lists of the best-dressed women in California. The petitioner also lectured on fashion design throughout the United States.

As in *Matter of Sonegawa*, USCIS may consider evidence of a petitioner's ability to pay a proffered wage beyond its net income and net current asset amounts. USCIS may consider such factors as: the number of years a petitioner has conducted business; the established, historical growth of its business; its number of employees; the occurrence of uncharacteristic business expenditures or losses; its reputation within its industry; whether a beneficiary is replacing a current employee or an outsourced service; and other evidence of its ability to pay.

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more than $800,000 in wages during the first quarter of 2013. However, the payroll tax returns do not indicate what portion of the wages was paid to non-clinical workers, or which employees are sponsored for immigrant visas. The record also does not include payroll information after March 2013, or income information beyond 2012.

In the instant case, the record indicates that the petitioner has conducted business since 2004. Copies of its federal quarterly payroll taxes indicate that it employed 70 people by the end of 2012. Its federal income tax returns also reflect increases in gross annual revenues and wages paid from 2011 to 2012. The record documents only these two years of the petitioner's operations.

However, the record does not include evidence of the petitioner's reputation in its industry. The record also does not indicate the occurrence of any uncharacteristic business expenditures or losses, or that the beneficiary will replace a current employee or an outsourced service.

Moreover, unlike the petitioner in *Matter of Sonegawa*, the instant petitioner has not provided evidence required by 8 C.F.R. § 204.5(g)(2) to document its ability to pay from the petition's priority date of January 23, 2013 onward. Also unlike the petitioner in *Matter of Sonegawa*, the instant petitioner has filed multiple I-140 petitions and has not submitted the requested information and evidence to establish its ability to pay the combined proffered wages of all the beneficiaries of its pending petitions. Thus, assessing the totality of the circumstances in this individual case, the record does not establish the petitioner's ability to pay the proffered wage.

For the foregoing reasons, the record does not establish the petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. Therefore, the Director's decision will be affirmed.

Petitioner's Intention to Employ the Beneficiary in the Offered Position

Beyond the Director's decision, the record does not establish the petitioner's intention to employ the beneficiary pursuant to the terms of the accompanying labor certification.[5]

A labor certification remains valid only for the particular job opportunity, the alien, and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). A petitioner must establish that it intends to employ a beneficiary pursuant to the terms of the accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (affirming a petition denial where the petitioner indicated that he did not intend to employ the beneficiary as a live-in-domestic worker as stated on the accompanying labor certification); *see also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 283 (Reg'l Comm'r 1979) (upholding a petition denial where the petitioner intended to employ the beneficiary outside the geographic area of intended employment stated on the accompanying labor certification).

In the instant case, the accompanying labor certification states that the petitioner will employ the beneficiary in the offered position of operations research analyst in Indiana.

[5] We may deny an application or petition for failure to comply with technical requirements of the law, even if the Director did not identify all of the grounds of denial in the original decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

In our NOID, we noted that online government records identify the address of the job location as a residence. *See* , Ind., http:/ (accessed Nov. 5, 2014). Specifically, the stated job location appears to be the home of the petitioner's incorporator/majority shareholder. The residential nature of the job location suggests that the petitioner does not intend to employ the beneficiary at that address. The petitioner did not respond to the request for evidence in our NOID that it does business at the address. *See* 8 C.F.R. § 103.2(b)(14) (stating that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a benefit request).

In addition, online records indicate that the beneficiary is a licensed registered nurse in and *See* N.Y. State Office of the Professions, http://ww (accessed Nov. 5, 2014); N.J. Dep't of Law & Public Safety, Div. of Consumer Affairs, https:/ (accessed Nov. 5, 2014). As indicated previously, the record shows that the petitioner provides healthcare staffing services. The beneficiary's nursing licenses suggest that the petitioner may intend to employ him as a nurse rather than in the offered position, the job duties of which do not directly involve healthcare services.

Further, the record suggests that a company other than the petitioner may intend to employ the beneficiary. For unexplained reasons, copies of federal income tax documentation in the name of accompanied the instant petition. Online Indiana records indicate that this company was incorporated on the same day as the petitioner, and that its president/incorporator holds the same titles with the petitioner. *See* Ind. Sec'y of State, Bus. Servs. Div., *supra*.

Complaints filed in federal courts allege that recruits alien healthcare workers and requires them to sign employment agreements and to obtain H-1B visas in the name of the petitioner or its assumed business name. *See* The petitioner's address on its new Form G-28 matches the principal address of in online Indiana corporate records. In addition, the signatory on the petitioner's Form G-28 is also reportedly an incorporator and vice president of

The matching address on the petitioner's new Form G-28 and the apparent business relationship between the petitioner and cast further doubts on which company intends to employ the beneficiary. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of a petition).

For the foregoing reasons, the record does not establish the petitioner's intention to employ the beneficiary pursuant to the terms of the accompanying labor certification. Therefore, the petition will also be denied for this reason.

Conclusion

The record does not establish the petitioner's continuing ability to pay the proffered wage. Accordingly, the Director's decision will be affirmed. In addition, the record does not establish the petitioner's intention to employ the beneficiary pursuant to the terms of the accompanying labor certification.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.